

# FREE SPEECH COALITION ET AL. V. HOLDER

BY VICTOR S. PERLMAN

You may recall an ASMP e-mail from late September, asking if you've ever made photographs showing nude or seminude subjects or showing actual or simulated sexual conduct. In addition to direct responses to that message, we received a number of inquiries from members about what had motivated our request, so we thought a brief article about the case might be of general interest.

In 2009, we were one of a group of plaintiffs that filed a lawsuit against the U.S. government, challenging the constitutionality of two related federal criminal statutes, 18 U.S.C. §2257 and §2257A, and their regulations. Those statutes require anyone who produces a depiction of sexually explicit imagery to obtain photo identification from all persons depicted, to maintain records that include those identification documents and to place a label on every image describing where the records are located. Further, they authorize federal agents to demand entry to inspect the records without a warrant. Our claim was that those laws are unconstitutional, on their face and as applied, under the First, Fourth and Fifth Amendments.

In a nutshell, our primary arguments were that those laws:

- Do not advance an important governmental interest in a direct and material way, are not narrowly tailored to a legitimate and important governmental interest and are over-inclusive and burden substantially more speech than is necessary.

- Are content-based regulations of speech that must, but do not, satisfy strict scrutiny by the courts.

- Have a chilling effect on photographers' right of free speech under the First Amendment.

In 2010, the U.S. District Court for the Eastern District of Pennsylvania granted the government's motion to dismiss the case without the need for discovery or an evidentiary hearing, i.e., without a trial. The plaintiffs then appealed that decision to the U.S. Court of Appeals for the Third Circuit. Then, in April 2012, the Third Circuit reversed the decision of the District Court and remanded the case to the District Court to proceed with a trial on the merits.

As anyone who has been involved in litigation knows, one of the first steps in any trial is pretrial discovery. That is the stage at which both sides get to ask the other side for relevant evidence and documentation. Our e-mail to members was sent to comply with the government's discovery demands. Essentially, we were seeking sample images of the sort that are covered by the statutes we are challenging.

I am happy to report that more than 400 ASMP members responded to our query. We reviewed all responses to narrow them down and collected multiple images from a number of ASMP photographers, which are being submitted to the government.

Among our arguments is that the record-keeping and disclosure requirements are unreasonably burdensome and have a chilling or inhibitory effect on our members who wish to produce sexually explicit imagery. We also take the position that the government's ability under the statutes to make warrantless searches violates our members' constitutional protections against unreasonable searches and seizures.

Since we are just at the beginning of the discovery phase, it will be quite some time before the case actually goes to trial. It will be even longer before the District Court rules, once the trial is over. We will continue to keep you informed of any significant developments, but in the meantime, I want to thank all of those who responded to our e-mail. Your input was a great demonstration of the devotion and dedication of ASMP's members to the Society and to the protection of our constitutional right of free speech.

## BILL CRAMER and His Wonderful Machine

all on page © Bill Cramer, www.wonderfulmachine.com



Philadelphia-based commercial portrait photographer Bill Cramer had dreamed about a cooperative business model for photography for years. Every time he saw a successful law firm or medical practice, he wondered why photographers couldn't do the same thing. "Why not share facilities, staff, equipment, insurance and marketing and refer assignments back and forth in a way that would increase everyone's revenue and decrease expenses?" he asked himself.

With the advent of digital, Cramer launched Wonderful Machine in 2004 as a cooperative with two other Philadelphia shooters. In 2007, he transformed the company from a local cooperative to a marketing engine for photographers everywhere. "Since we already had staff in place to support the photographers in our cooperative, we were able to grow gradually and organically," he explains.

As his roster (and revenue) grew, Cramer added staff and expanded the company's

marketing efforts to support them. The business now employs a full-time staff of 13, including two graphic designers, four photo editors, five producers, a writer and a business manager. The Web site is also rich with valuable content, including a resources page with information on agents, consultants, educational tools and many other support services.

Wonderful Machine currently represents 640 photographers in 50 countries, many of them ASMP members. Member photographers pay a monthly fee to be promoted for commercial and editorial assignments and an hourly fee on request for help with design, editing, writing, estimates or production, with no commissions or level of exclusivity required. This structure allows photographers to scale support up according to their needs at any given moment, as well as allowing the Wonderful Machine marketing staff to coordinate their efforts with traditional reps without conflict of interest.

Indeed, Cramer takes an integrated approach to what he offers photographers. "When I started Wonderful Machine, I was really focused on marketing," he says. "But after perusing literally thousands of Web sites, I saw that even accomplished photographers sometimes struggled with branding. Until a photographer gets his or her brand in place, there's no sense in promoting it. Consequently, we've become quite adept at working to help photographers optimize their edit and their marketing materials to ensure that their marketing efforts aren't wasted."

Beginning in January, Cramer will be a featured speaker in ASMP's education program. Read more about his seminar, Real World Pricing & Negotiating, on page 5 of this issue. To learn more about Cramer's company and to view images by photographers he works with, visit [www.wonderfulmachine.com](http://www.wonderfulmachine.com).

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